

**APR 19 2006**

**NOT FOR PUBLICATION**

**CATHY A. CATTERSON, CLERK  
U.S. COURT OF APPEALS**

**UNITED STATES COURT OF APPEALS**

**FOR THE NINTH CIRCUIT**

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

SALVADOR TOLENTO-MARTINEZ,

Defendant - Appellant.

No. 05-50469

D.C. No. CR-04-03014-LAB

**MEMORANDUM\***

Appeal from the United States District Court  
for the Southern District of California  
Larry A. Burns, District Judge, Presiding

Argued and Submitted April 4, 2006  
Pasadena, California

Before: PREGERSON, LEAVY, Circuit Judges, and BEISTLINE,\*\* District  
Judge.

The facts of this case are known to the parties.

---

\* This disposition is not appropriate for publication and may not be cited to  
or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

\*\* The Honorable Ralph R. Beistline, United States District Judge for the  
District of Alaska, sitting by designation.

We conclude that Tolento-Martinez's 2002 convictions constitute "sexual abuse of a minor" and, therefore, were "aggravated felonies" under 8 U.S.C. § 1326(b)(2). *See United States v. Baron-Medina*, 187 F.3d 1144, 1147 (9th Cir. 1999) (holding that conviction under Cal. Penal Code § 288(a) for lewd or lascivious act upon a child under the age of fourteen qualified as sexual abuse of a minor).

We consider next the district court's reliance on Tolento-Martinez's 2004 removal. In *United States v. Luna-Madellaga*, 315 F.3d 1224 (9th Cir. 2003), this court determined that 8 U.S.C. § 1326 "speaks only of 'removal.'" All that the statute requires is that the alien reenter the United States illegally after having been removed subsequent to an aggravated felony conviction. It plainly turns on the alien's *physical* removal - not the *order* of removal." *Id.* at 1226. We conclude, therefore, that it was appropriate for the district court to rely upon Tolento-Martinez's 2004 reinstatement of the immigration judge's 1999 order of deportation.

We also find that the Supreme Court's decision in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998) was not overruled by *Apprendi v. New Jersey*, 530 U.S. 466 (2000), thus foreclosing Tolento-Martinez's claim that 8 U.S.C. § 1326 is unconstitutional. *See United States v. Velasquez-Reyes*, 427 F.3d 1227,

1229 (9th Cir. 2000). Furthermore, the district court properly denied Tolento-Martinez's motion to dismiss the indictment based on improper grand jury instructions. *See United States v. Navarro-Vargas*, 408 F.3d 1184, 1186 (9th Cir. 2005) (en banc).

**AFFIRMED.**